



State of Utah

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*Lieutenant Governor*

Department of  
Environmental Quality

Amanda Smith  
*Executive Director*

DIVISION OF AIR QUALITY  
Bryce C. Bird  
*Director*

DAQ-039-11

**MEMORANDUM**

**TO:** Air Quality Board

**THROUGH:** Bryce Bird, Executive Secretary

**FROM:** Dave McNeill, SIP/Rules Section Manager

**DATE:** June 23, 2011

**SUBJECT:** Review and Recommended Response to Petition for a Rule Change to Develop a Greenhouse Gas Emissions Inventory and Adopt a Greenhouse Gas Reduction Plan

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On May 4, 2011, the Executive Secretary of the Board received a petition on behalf of nineteen Utah citizens requesting that the Air Quality Board, as well as other state agencies, promulgate rules and take other actions to develop a comprehensive plan for preventing, abating, and controlling greenhouse gas (GHG) emissions. Under the Utah Rulemaking Act, within 80 days of receipt of the petition, the Board must either deny the petition in writing, providing the reasons for denial, or initiate rulemaking proceedings. Utah Code Ann. § 63G-3-601(6).

Below are staff recommendations and a discussion describing the petition, the Board's authority and the impact of the petition on DAQ resources, as well as an overview of current federal and state GHG programs. However, as the petition relates to climate change, global warming, and related anthropogenic impacts, all of which are the subject of national and global debate, an analysis of the scientific basis of that debate is beyond the expertise of the DAQ staff.

1. The Petition: The petition requests that Utah compile information gathered through the "Mandatory Reporting and Verification Rule" and use that information in combination with modeling, estimates, and voluntary information, to publish an annual GHG emissions inventory, and that the report be published no later than December 1 of each year. Additionally, the petitioners request that by January 1, 2012, the Board adopt a plan to reduce GHGs emissions in Utah by 6% per year, and that by January 1 of each year, DAQ compile and publish an "Effectiveness Report," showing the actual GHG emissions by source category compared to the emissions targets established in the reduction plan. If the actual emissions are above the projected emissions, then the Board is to take "corrective action" to verify that Utah's emissions will return to 1990 levels by 2050.

2. The Board's Authority: As authority for its petition, petitioners cite to the State statute giving the Board authority "regarding the control, abatement, and prevention of air pollution from all sources and the establishment of the maximum quantity of air contaminants that may be emitted by any air contaminant source." Utah Code Ann. § 19-2-104(1)(a). Petitioners also reference Utah Code Ann. § 19-2-104(3)(e), the Board's authority to develop State Implement Plans (SIPs). However, petitioners' request is not part of the State SIP program.

Over the past 30 years, DAQ has implemented many new programs. However, whenever a new program has been implemented that would have a significant impact on DAQ's workload or available resources, or, if the legislature may not have considered this new program when it enacted or amended the Air Conservation Act, DAQ (in the case of federally mandated programs) or others have worked with the legislature to 1) ensure that the Board has the authority to implement the new program, and 2) provide the resources necessary to implement the new program. This process was followed to implement the Asbestos in Schools program, the Lead-Based Paint program, vehicle inspection/maintenance programs, and the Operating Permits program, all of which were mandated by federal law. With respect to the petition, the staff recommends the Board not embark on such a comprehensive and resource-intensive program, unless there is specific legislative authority to do so and, thus, staff recommends the Board deny the petition..

3. Impact of Petitioners' Request on DAQ Resources: Currently, DAQ is in the process of developing a SIP for PM<sub>2.5</sub>. A large portion of northern Utah has been found to be in violation of that standard, and DAQ is well on the way to developing a SIP for that area. This process has absorbed inventory, modeling, and SIP development staff for over a year, and will continue to do so until the project is complete. The PM<sub>2.5</sub> SIP is also demanding a significant amount of work by the NSR engineers as they review each of the major industrial sources in the nonattainment area for current and potential Reasonable Available Control Technology (RACT) controls.

In the past two years, EPA promulgated new National Ambient Air Quality Standard (NAAQS) for CO, NO<sub>2</sub>, and SO<sub>2</sub>. Current monitoring data show that Utah meets each of those standards; however, changes to the monitoring requirements for the CO and NO<sub>2</sub> NAAQS will require the placement of "near-highway" monitors for those two pollutants, and once those monitors are operational, that data will have to be analyzed to verify Utah's attainment status.

Because of the way EPA wrote the implementation rule for SO<sub>2</sub>, a designation as an attainment area can only be based on a combination of monitoring data and modeling data; therefore, Utah has requested EPA to designate all areas as "Unclassifiable" due to a lack of adequate modeling. As a consequence, DAQ will be required to undertake a significant modeling effort to determine the attainment status of areas around major industrial sources of SO<sub>2</sub>. By June of 2013, DAQ will need to expend a significant effort to write a new SO<sub>2</sub> SIP, identifying areas where problems may exist, and developing a plan to bring those areas into attainment by July of 2017.

Additionally, EPA has announced it will promulgate a new NAAQS for ozone by July 31, 2011. Indications from EPA are that the new standard will be more restrictive than the current one. Much of northern Utah already violates the existing standard and, depending on the level set by EPA, most of Utah could be in nonattainment for the new standard. Monitoring data from National Parks in and around Utah indicate that ozone is much more of a regional issue than EPA or DAQ ever before supposed. The SIP development effort that has gone into the PM<sub>2.5</sub> SIP over the past two years will be dwarfed by what the SIP for ozone will require.

Finally, monitoring data from the Uintah Basin has shown that there is a winter-time ozone problem in that area. DAQ, EPA, and other federal and tribal agencies have already established multiple monitoring sites in the area to try to understand the issues out there; but this is looming as a potentially significant drain on already-stretched resources.

As can be clearly seen from the above list of projects on which DAQ is currently working, the available resources at DAQ are already stretched to the limit. A recent FTE analysis identified that DAQ will need more FTEs in order to keep up with the tasks already required by state and federal law. The actions requested by the petitioners would require a Herculean effort by the same staff already over-extended on the above tasks. In order to accomplish what has been requested in the petition on top of what is already being done is not possible with current resources and, thus, staff recommends the Board deny the petition.

4. Current EPA GHG Requirements: Following a finding by the EPA Administrator that GHGs cause or contribute to the endangerment of human health (Endangerment Finding), EPA began addressing GHGs in a measured approach. As with any pollutant, it is important to know the source and quantity of emissions. Therefore, one of the first actions EPA took was the promulgation of the mandatory Greenhouse Gas Reporting Rule, in October of 2010. This rule will allow EPA to begin collecting an inventory of greenhouse gas emissions from all sources of more than 25,000 tons per year (tpy) of CO<sub>2</sub>equivalents (CO<sub>2</sub>e). EPA has extended initial reporting deadlines, currently set for the end of this year but likely to be further extended. The states are not involved in collecting the GHG inventory data under the Greenhouse Gas Reporting Rule; EPA retained that authority for itself.

The six GHGs EPA regulates are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. Each of these has a Global Warming Potential (GWP), ranging from 1 (for CO<sub>2</sub>) to 23,900 (for SF<sub>6</sub>). The GWP is used to calculate how the warming potential of a pollutant compares to that of CO<sub>2</sub>. For example, the warming potential of 1 ton of HF<sub>6</sub> is equivalent to the warming potential of 23,900 tons of CO<sub>2</sub>; therefore, 1 ton of HF<sub>6</sub> is 23,900 tons of CO<sub>2</sub>e.

Besides collecting the information necessary to understand the quantity of pollutants emitted, when EPA published its Endangerment Finding, it automatically triggered two requirements: 1) a source with a potential to emit 100 tpy or more of any of the six GHGs must obtain an operating permit; and 2) a new source with a potential to emit 250 tpy or more of GHGs (100 tpy for listed sources) must address those emissions whenever it applies for a permit under the Prevention of Significant Deterioration (PSD) program.

As you were briefed in August 2010, for greenhouse gases, 100 tpy is an extremely low number – many office buildings, apartment complexes, and light industrial complexes probably exceed that level. EPA estimated that the Endangerment Finding could result in more than 6,000,000 new operating permits and over 82,000 PSD permits nationwide. Therefore, in an attempt to avoid these “absurd results,” EPA promulgated the Tailoring Rule, phasing in a raised threshold for triggering PSD to 100,000 tpy CO<sub>2</sub>e for new sources or 75,000 tpy CO<sub>2</sub>e for modification of existing sources. Beginning July 1, 2011, a source can become a PSD source based solely on its emissions of GHGs. Last year, when the Tailoring Rule was incorporated into Utah’s air quality rules, the staff briefed the board on the potential impact of the Endangerment Finding absent the Tailoring Rule on the NSR and Operating Permits programs in Utah. The Tailoring Rule provides a rational phase-in for regulating GHGs. The staff recommends the Board deny the petition because Utah is taking a phased approach to regulating GHG emissions under EPA delegated programs.

5. Current Utah GHG Requirements: As mentioned above, in response to the EPA’s Endangerment Finding and EPA’s subsequent promulgation of the Tailoring Rule, the Board incorporated the Tailoring Rule into Utah’s Air Quality Rules. What this means is that if a new source is projected to emit 100,000 or more tpy of CO<sub>2</sub>e, then that source is required to obtain a PSD permit for GHGs, whether or not it is PSD for the other criteria pollutants. A source may be required to obtain an operating permit based on its emissions of GHGs, but its permit fee is not based on the quantity of GHG emissions, as is done with other regulated pollutants. As specified in the federal Greenhouse Gas Reporting Rule, DAQ is not involved in collecting the GHG inventory. The Staff makes the same recommendation as in section 4 above.

It should be noted that many of the programs the State is currently implementing for other purposes have side benefits of reduced GHG emissions. For example, the Clear the Air campaign currently under way results in lower vehicle miles traveled, which also results in lower GHG emissions. Restrictions on wood burning during the winter for PM<sub>2.5</sub> controls, or the smoke management program instituted for the Regional Haze SIP, also result in lower CO<sub>2</sub> emissions. Regulations on equipment leaks from oil and gas production and refining facilities reduce methane emissions.

6. Other Issues: Climate change and the regulation of GHGs are national, if not global in scope, and as such, require a federal approach and leadership. The EPA has been and is moving forward with national GHG regulations, which are critical for parity across states and industry. Moving out in front of EPA on GHG regulation presupposes EPA's direction and may result in control strategies for sources in Utah that conflict with requirements EPA will be imposing in the future.

Recommendation: Based on the considerations above, it is the recommendation of staff that the Board deny the petition.



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June 21, 2011

***Via Email and Hand Delivery***

Executive Secretary Bryce Bird  
Utah Air Quality Board  
c/o Utah Division of Air Quality  
195 N. 1950 W., Fourth Floor  
Salt Lake City, UT 84116

Re: *Petition for a Rule Change to Adopt a Greenhouse Gas Reduction Plan in Order to Maintain the Integrity of the Atmosphere, a Public Trust Resource*

Dear Executive Secretary Bird and Members of the Air Quality Board:

Thank you for letting me and Sierra Adler comment following Denise Chancellor's informational briefing on the Petition to Adopt a Greenhouse Gas Reduction Plan at the last Air Quality Board meeting. I want to clarify two points in these written comments.

The first point is fairly obvious, but may be worth stating explicitly. The Petition for Rulemaking does not ask the Air Quality Board to adopt a Greenhouse Gas Reduction Plan within eighty days. Instead, the petition requests a rule stating that the Air Quality Board "shall develop and adopt a binding Greenhouse Gas Reduction Plan." This wording was chosen in recognition of the fact that the development and adoption of a binding Greenhouse Gas Reduction Plan will require the involvement of stakeholders, experts, and other agencies. Therefore, even if the Air Quality Board were to adopt the proposed rule, the petitioners recognize that it would take time to actually develop a rule requiring an annual 6% reduction in greenhouse gas emissions. The other request in the petition—that the Air Quality Board adopt a rule requiring the compilation and publication of annual greenhouse gas emissions—is more straightforward, but the petitioners recognize that this too, would be a substantial undertaking and would probably take longer than eighty days to complete.

Which brings us to our second point—timing. After looking closely at the Utah Administrative Rulemaking Act, Utah Code Ann. § 63G-3-101 *et seq.* and its implementing rules, Utah R. 15-2-1 *et seq.*, we disagree with the position taken by Ms. Chancellor that the Air Quality Board must either grant or deny the petition within 80 days.

The language relied upon by Ms. Chancellor is found in Utah Code Section 63G-3-601, which is part of the Utah Administrative Rulemaking Act. Section 63G-3-601 establishes the procedures by which an “interested person” may “request the making, amendment, or repeal of a rule” by petition and sets deadlines for subsequent agency action on that petition. As described in Ms. Chancellor’s power point presentation, the Air Quality Board must either deny the petition or “initiate rulemaking procedures” within eighty days. Utah Code Ann. § 63G-3-601(6)(b)(i), (ii). The statute defines the term “initiate rulemaking proceedings” as the filing of the proposed rule for publication with the Division of Administrative Rules.<sup>1</sup>

The Utah legislature directed the Division of Administrative Rules to adopt procedural rules clarifying the process for submitting and considering petitions for rulemaking. *See* Utah Code Ann. § 63G-3-601(3) (“The division shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition.”). According to Rule 15-2-2, an agency may comply with the statutory deadline by writing a response to the petition stating either that the petition is denied and the reasons therefore, or “the date when the agency is initiating a rule change consistent with the intent of the petition.” Utah. Admin. R. 15-2-2(1)(ii). In other words, the Air Quality Board could comply with the statutory deadline by notifying petitioners, for example, that the Board anticipates publishing the rule, as required by Section 63G-3-301(4), in six months.

This interpretation makes sense because it provides petitioners with an answer and some certainty as to when they can expect some action from the agency, but it also provides the agency with enough flexibility to thoughtfully consider complicated rule proposals. Subsection (2) of Rule 15-2-2, which states that an agency may “take any action the agency, in its judgment, deems necessary to provide the petition due consideration,” supports our interpretation. Notifying a petitioner that the agency needs more time to provide the petition due consideration certainly qualifies as “any action.”

The rulemaking process should be flexible. Section 63G-3-301(3) states that each agency “shall develop and use flexible approaches in drafting rules that meet the needs of the agency and that involve persons affected by the agencies rules.” Interpreting section 63G-3-601(6) as imposing a rigid deadline that hamstring the Air Quality Board’s authority to take meaningful action on complex issues does not make sense and is inconsistent with the rest of the Utah Administrative Rulemaking Act.

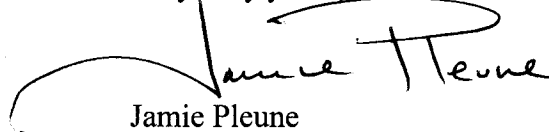
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<sup>1</sup> Subsection (1) of 63G-3-601 defines “initiate rulemaking proceedings” as follows: “the filing, for the purposes of publication in accordance with Subsection 63G-3-301(4) of an agency’s proposed rule to implement a petition for the making, amendment, or repeal of a rule as provided in this section.” Utah Code Ann § 63G-3-601(1). Section 63G-3-301(4) requires an agency to send a copy of the proposed rule to the Division of Administrative Rules for publication. In the enclosed chart published by the Division of Administrative Rules, this step would be considered the “Proposal Phase.”

action on complex issues does not make sense and is inconsistent with the rest of the Utah Administrative Rulemaking Act.

As I stated at the Air Quality Board Meeting, the petitioners want to work collaboratively with the Air Quality Board, the Division of Air Quality, and all other petitioned agencies to develop a scientifically viable plan for reducing greenhouse gas emissions in order to protect the youth's opportunity to enjoy a livable future. We look forward to working with you on this important issue.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jamie Pleune". The signature is fluid and cursive, with a large loop at the end of the last name.

Jamie Pleune  
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